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# The Conundrum of Leaves

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## I. Introduction

With the advent of public policies that are geared toward allowing employees the opportunity to balance their work life with family and other commitments, the employer often finds itself in a conundrum when attempting to implement the various laws that are at the heart of these leave policies. Enacted at different times to achieve differing public purposes, these relatively newer leave laws have been promulgated over the backdrop of older laws, such as the Americans with Disabilities Act[1] and Worker's Compensation.[2] This article will focus on three statutes that mandate different types of leave: the Family Medical Leave Act,[3], the Victims Economic Security and Safety Act,[4] and the Uniformed Services Employment and Reemployment Act.[5]

## II. Family Medical Leave Act

The mother of the new leave laws is the Family Medical Leave Act (FMLA).[6] A product of the Clinton administration, "[t]he FMLA was enacted to help working men and women balance the conflicting demands of work and personal life."[7] The act is only eleven years old; thus, questions of application and conflict with other laws are still being litigated.



FMLA covers all public employers, regardless of size.[8] Public employees are eligible to take FMLA leave, which is unpaid, if they have been employed for at least twelve months, have worked at least 1,250 hours in a twelve month period, and are employed at a worksite with fifty or more employees within seventy-five miles.[9] Therefore, while a public employer falls within the ambit of the FMLA regardless of the number of employees it employs, public employees are only entitled to FMLA benefits if they work at a site where the employer has at least fifty employees within this seventy-five mile area.[10] Consequently, questions may arise as to whether a public agency should be considered separately, or together with a larger governmental unit, for purposes of FMLA eligibility. The federal courts first look to state law and, where such law is inconclusive as to the employment connection between the two government entities, the courts will look to the "Census of Governments."[11]

The impetus behind the FMLA was to allow American workers leave for pregnancy and the care of a newborn or newly adopted child. However, it is FMLA's broader reach that creates difficulties in interpretation and application.[12] The more difficult issues involve the use of FMLA leave for a "serious health condition" of the employee, his or her spouse, child or parent.[13] The FMLA defines such a condition as an illness, injury, impairment or physical or mental condition that involves: (1) inpatient care, including any period of incapacity or subsequent treatment related to such; or (2) continuing treatment by a health care provider,[14] generally involving a period of incapacity of more than three consecutive calendar days and a regiment of treatment thereafter.[15] Where the family or medical condition giving rise to the leave is foreseeable (such as a planned birth or surgery), an eligible employee is generally required to give thirty days notice to the employer of the need to take FMLA leave.[16]

However, in many instances the medical leave is not foreseeable, especially since the FMLA "serious health condition" definition encompasses incapacity or treatment due to a "chronic condition" which requires periodic visits for treatment, continues over an extended period of time and may cause "episodic incapacity" rather than continuous incapacity.[17] On its model FMLA forms, the U.S. Department of Labor identifies asthma, diabetes, and epilepsy as examples of such chronic conditions.[18]

FMLA's concern is focused on a person's medical incapacity to work generally, not on whether the person is physically unable to perform a specific job. Thus, where an employee's inability to work may remove him

from the class of "qualified" individuals protected under the ADA, his illness may nonetheless qualify him for FMLA leave and, accordingly, allow for reinstatement to his position after the period of incapacitation.[19] Under FMLA, unlike the ADA, the employer has an obligation to ascertain whether the illness is FMLA-qualifying. For example, in *Byrne v. Avon Products*,[20] the Seventh Circuit reversed summary judgment in favor of the employer where questions existed as to whether an employee's severe depression rendered him unable to work — or even to give his employer notice of his condition. Byrne was a "model employee" who began experiencing severe depression; at work he began engaging in erratic behavior, was observed sleeping on the job and discharged.[21] He challenged his discharge on ADA and FMLA grounds.[22] While there was no ADA violation because the court concluded Byrne's depression rendered him incapable of performing his job, the FMLA count survived.[23] Even though Byrne had never requested FMLA leave, and FMLA leave depends on the employer's knowledge of a qualifying condition, the court held that such knowledge could be imputed to the employer.[24] Thus, courts will look to the reasonableness of the employer's actions when discipline is imposed for conditions that might reasonably be construed as necessitating FMLA leave.[25]

FMLA leave is not intended to supplant existing workplace leave policies or negotiated contract provisions; rather, FMLA leave can run concurrently with existing paid sick leave policies.[26] Thus, if an employee's use of sick leave is otherwise FMLA-qualifying, it can count against the twelve weeks allowable, as well as against the allowable amount of paid sick leave. Further, when an employee seeks leave, it is the employer's responsibility to appropriately designate the leave, if it is FMLA covered, and give notice of such designation to the employee.[27] U. S. Department of Labor (DOL) regulations provide that "[t]he employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means."[28]

While an employer is entitled to verify the need for FMLA covered leave, caution must be exercised in doing so. Where the employer questions an employee's medical certification, it can require the employee to get a second opinion, at the employer's expense, so long as the medical provider offering the second opinion is not "employed on a regular basis by the employer."[29] Where the first two opinions differ, a third one might be required.[30] However, where the employee's documentation of the reasons for his absence is so weak as to not present evidence of a qualifying condition under FMLA, the employer is presented with a dilemma as to whether to require him to seek additional medical certification or to just accept his evidence, or lack thereof, and deny leave because his condition was unsubstantiated. DOL regulations, as well as federal and state medical privacy laws, require the use of caution in requesting additional medical information from the employee's medical provider.[31]

Generally, where the employee's documentation and reasons for leave, on their face, do not present "evidence of incapacity," courts have held that the FMLA claim fails as a matter of law.[32] In *Levine v. Children's Museum of Indianapolis, Inc.*, the court relied on legislative history to support its conclusion that the FMLA was not intended to establish a national sick leave policy for minor or temporary illnesses and discomforts:

> The term "serious health condition" is not intended to cover short-term conditions for which treament and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedure that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period.[33]

Nonetheless, while questions of the sufficiency of an employee's notice, documentation, and reasons for seeking leave are largely questions of fact, any conclusions the employer draws from those facts concerning whether the leave qualifies under FMLA require a heavy dose of reasonableness since the law encompasses such nebulous concepts as leave that is "unforeseeable." For example,

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where leave is unforeseeable, advance notice of the leave is not required.[34] A telephone call, with follow-up documentation within a reasonable period of time thereafter is generally sufficient.

Such minimal notice requirements were confirmed by the Michigan Court of Appeals in *Woodman v. Miesel Sysco Food Service Co.*[35] The employee in this case experienced severe chest pain while working and later reported to a local emergency room. While the emergency room doctor determined that he had not suffered a heart attack, a stress test was ordered and the employee was instructed to refrain from working until the test could be performed. The employee called his workplace and reported the doctor's orders.[36] Days later, the stress test revealed that there was no heart condition and the employee was deemed able to return to work. However, the employer had already terminated him for violating the terms of the collective bargaining agreement. The employee filed suit, alleging violations of the FMLA; both the district and appellate courts found that the employee's telephone call constituted sufficient notice under the FMLA and ordered reinstatement and backpay.[37]

While consideration of employee rights and obligations requires a reasoned and informed application of FMLA law and regulations, some specific employer FMLA obligations are more straightforward. First, an employer must post the requisite federal notice in conspicuous places and provide an explanation of FMLA entitlements in its policies or handbook.[38] Where an employee is placed on FMLA leave, the employer must give notice of such leave to the employee, and explain to the employee his rights and obligations.[39] That notice must include any requirements for medical certification, whether the employer requires the substitution of paid sick leave, any requirements regarding premium payments for health insurance, any requirements for a fitness-for-duty certification upon return to work, the employee's right to reinstatement after leave, including whether the employee is designated a "key" employee, which may affect his right to reinstatement.[40]

Since this law is so heavily dependent on reasonable interpretations of a very broad federal law and liberal regulations, those interested in its proper application would be well advised to become familiar with the extensive information provided by DOL on its website, at www.dol.gov, including model forms for employee leave requests, employer leave notices, and medical certifications. Further, all employers should have a clearly articulated FMLA leave policy, which includes the employer's designation as to how the twelve month leave period will be construed. At the employer's election, the twelve month period can coincide with the calendar year (January 1 – December 31), a fiscal year, an employee's anniversary year, or it can be a rolling twelve month period, which can begin upon the day an employee first uses FMLA leave and ends twelve months thereafter.[41]

If an employer fails to make this designation, the employee can use whatever twelve month period is most beneficial to him.[42] The employer's policy should also clearly set forth the employer's expectations of an employee, especially concerning notice, and how the employer treats FMLA leave vis-à-vis any pre-existing paid sick leave and other leaves.[43] Large public employers should coordinate FMLA leave policies, to the greatest extent possible, among their various departments. All public employers would be wise to ensure that legal counsel reviews all their leave policies and that, where serious questions exist regarding the termination of employees for medically related absences, that counsel is consulted.

## III. Victim's Economic Security and Safety Act

If FMLA is the mother of leaves from the workplace, Illinois' new Victim's Economic Security and Safety Act (VESSA)[44] is the baby. VESSA, effective August 25, 2003, is patterned after the FMLA but designed to allow twelve weeks of unpaid leave to an employee who is the victim of domestic violence or sexual violence or who cares for a family member who has been a victim of such violence.[45] VESSA is broad in purpose: (1) to provide victimized employees the opportunity to take unpaid time off work for such things as seeking medical or legal assistance, counseling services, obtaining orders of protection, looking for alternative housing; (2) to promote the State's interest in reducing domestic violence; and (3) to address the failure of existing laws to adequately consider the need for victims of domestic and other violence to be away from work.[46]

The new law applies to all Illinois "public agency" employers, regardless of size of the workforce, and to those "individuals" (defined as partnerships, associations, corporations, business trusts, legal representatives or any other organized group of person) who employ more than fifty people.[47] A "public agency" is defined as "the Government of the State or political subdivision thereof; any agency of the State, or of a political subdivision of the State; or any government agency."[48] The new law applies to all employees, part-time and full-time, and even those individuals who are in welfare-to-work programs.[49] VESSA does not apply, however, to independent contractors.[50]

VESSA leave entitlement is for those employees who are victims of domestic or sexual violence them-

selves or who have "family or household members" who are victims, so long as the family member's interests are not adverse to the employee's.[51] (Basically, an employee cannot claim VESSA leave to take his wife to the hospital or counselor if he himself is the abuser.) VESSA defines "family household member" as "spouse, parent, son, daughter, and persons jointly residing in the same household."[52] Last legislative session, Senators Collins and Obama introduced a bill to expand entitlement to those employees who have been victims of "violent felony crimes" (or family members who have).[53] The bill was sent to the "rules" committee and may yet resurrect in upcoming legislative sessions.[54]

Since the new law is just over a year old, there have been no cases yet adjudicated by the courts concerning any legal issues attendant to this broadly written statute. The major questions involve the extent to which VESSA crosses paths with FMLA; specifically, whether an employer can count leave which is both FMLA-qualifying and VESSA-qualifying against each of the separate twelve week in twelve months clocks. That question appears to be answered in the affirmative, since section 20(a)(2) of the new law specifically states that the Act "does not create a right for an employee to take unpaid leave that exceeds the unpaid leave time allowed under, or is in addition to the unpaid leave time permitted by," FMLA.[55] However, the new law also provides that an employee may "elect" to substitute any existing leave (family, medical, sick, annual, personal, etc.) that may be available to her for the specific circumstances.[56] Additionally, VESSA provides that more protective "laws, agreements, programs and plans" are not limited by VESSA and less protective "laws, agreements, programs and plans" can not be applied to diminish any rights established under VESSA.[57]

The employer is required to post a notice of rights under VESSA[58] and can require certification from the employee that the leave is sought for VESSA-qualifying purposes.[59] Such certification can be satisfied by a sworn statement of the employee and corroborating documentation such as a police record, a court order or a statement from a medical professional, a member of the clergy, or an employee of a victim's services organization.[60] The information given in the certification, unless disclosure is required by law, must be kept confidential unless the employee herself, requests disclosure in writing.[61]

Leave can properly be taken for a number of reasons, so long as those reasons are related to the employee's, or his family household member's, victimization.[62] Leave can be taken on an intermittent or reduced work schedule basis.[63] The employee is supposed to provide the employer with at least forty-eight hours advance notice of the intention to take the leave, unless such notice is "not practicable."[64]

VESSA establishes leave rights similar to those established federally in FMLA, but also similar to those established in the federal and state anti-discrimination laws. For example, the "prohibited acts"[65] and "Victim's employment sustainability; prohibited discriminatory acts"[66] sections read much like the protected rights sections contained in the Illinois Public Labor Relations Act,[67] the Illinois Educational Labor Relations Act,[68] and the Illinois Human Rights Act.[69] In these provisions, VESSA cites a long list of prohibitions regarding employment actions that are intended to, or have the effect of, interfering with the job rights of one who has been abused or is taking care of an abused family member. VESSA also protects against retaliation against a person who opposes a practice made unlawful by VESSA.[70] Further, VESSA prohibits any reduction in public assistance for reasons related to the protections offered by VESSA.[71]

VESSA also draws certain job protections from the policies embedded in the ADA.[72] For example, an employer is under an obligation to provide "reasonable accommodation" to a employee victim, which can include such things as providing a changed telephone number, a new seating assignment, installation of locks, security adjustments to a facility, a transfer, reassignment or changed job schedule.[73] The accommodation is required unless it would cause "undue hardship," which requires weighing various factors that are related to the reasonableness of the accommodation, such as the difficulty and expense of the accommodation and the overall financial and workplace resources of the employer.[74] The idea appears to be that an employer should, to the extent possible and consistent with resources and the nature of the job, provide a workplace where the victimized employee has safe shelter from her abuser.

Enforcement of VESSA rests with the Illinois Department of Labor (IDOL),[75] who has developed regulations[76] to implement the Act and has various information, including the standard poster and complaint forms, available through its website.[77] An employee who feels her rights have been violated under VESSA has a three year time frame within which to file a complaint with the IDOL.[78] The IDOL process relies heavily on investigation and settlement, with which the parties are expected to cooperate.[79] At the conclusion of the investigation, IDOL is to make one of three determinations: reasonable cause, no reasonable cause, or failure to cooperate.[80] A formal hearing will then be held at the written request of a

party.[81] To date, IDOL has received a number of complaints, all of which have been settled. The following penalties and remedies are available under VESSA: damages equal to the lost wages, salary or other benefits, with interest; equitable relief, including reinstatement, promotion, reasonable accommodation; reasonable attorneys fees and other costs of the proceeding; and a 1 percent penalty, per calendar day, for failure to pay damages within thirty days of an IDOL order.

## IV. Uniformed Services Employment and Reemployment Act

If FMLA is the mother of all leaves, and VESSA the new baby, USERRA is certainly the granddaddy. The Uniformed Services Employment and Reemployment Act (USERRA)[82] is a timely clarification and reenactment of the old Veterans' Reemployment Rights Act (VRRA).[83] Intended to minimize the disadvantages to the many men and women who are absent from their civilian employment to serve in our country's uniformed services, USERRA was signed into law on October 13, 1994. Administered by the U.S. Department of Labor, through the Veterans' Employment and Training Service,[84] USERRA seeks to ensure that those who serve their country are free from discrimination as a result of their service and that, during their service, they are able to retain their civilian employment and benefits.

USERRA is available to all employees who serve in the federal "uniformed services" which includes the Armed Forces (Army, Navy, Marines, Coast Guard, etc.), the Army National Guard and the Air National Guard (whether engaged in active duty training, inactive duty training, or full-time guard duty), the commissioned corps of the Public Health Service and anyone else designated by the President in the time of war or emergency.[85] Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002,[86] certain workers who perform responsibilities pursuant to that law, or train for such, are considered part of the federal uniformed services for purposes of this definition. USEERA applies to all U.S. employers, regardless of size, and covers nearly all employees, including part-time and probationary workers.[87] The law requires that the service member's employer allow leave and reemploy the returning uniformed services employee if the job he or she held was a civilian one, required notice was given to the employer (unless precluded by military or other reasonable necessity), the cumulative period of service did not exceed five years, the service member was not released dishonorably, and the returning service member reported back to the civilian job in a timely manner, with a timely request for reemployment.[88] The timeliness of this request depends on the duration of military service. USERRA's comparable state law is entitled the Service Member's Employment Tenure Act,[89] initially promulgated in 1941.

While USERRA protects only those performing federal service, the following newer Illinois laws provide state law protection for returning men and women who have performed state military service: the Public Employee Armed Services Rights Act,[90] the Local Government Employees Benefits Continuation Act,[91] the Illinois National Guard Reemployment Act,[92] and certain provisions of the Illinois School Code.[93] To the extent to which any of these laws create greater protections than USSERA, they control. To the extent USSERA provides greater protection, it controls.

One of the initial "conundrum" issues concerning USSERA and other military leave laws involved how FMLA eligibility would be established for a service member who, but for his service leave, would have qualified for eligibility.[94] The federal agencies responsible for the administration of these laws have made clear their interpretation: FMLA eligibility for an absent service member is counted as if the person were at work.[95]

A person who is reemployed under USERRA is statutorily entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the beginning of the service plus the additional seniority and rights and benefits that he or she would have attained if the person had remained continuously employed.[96] At least one federal circuit court has refused to extend that "constructive continuous employment" doctrine to other non-seniority contractual benefits that accrue to employees by time in the workplace.[97] In an opinion that discusses the policies underlying USERRA and its predecessor, the VRRA, the Fifth Circuit Court of Appeals ruled that, as to the accrual of other non-seniority benefits (such as loss of overtime benefits), USSERA "reflects no intention to prohibit neutral labor contracts from treating employees on military leave equally with those on non-military leave with respect to the loss of benefits due to absence from work."[98]

However, under these military leave statutes, employers must observe what has been referred to as the "escalator principle" for returning service members: they must reinstate eligible returning employees to the position that they would have held had they been continuously employed.[99] The only stipulation is that they are qualified for such position and the employer is under an obligation, with reasonable effort, to assist the returning employee by providing whatever training is necessary to get

qualified.[100] If an employee is unable to become qualified, the employer must place him in the most similar position for which he is qualified.[101] At least one court has determined that the "escalator principle" does not entitle an employee to a better position than the one he occupied, or would have occupied had he been continuously employed.[102]

The returning employee is also under certain obligations. Importantly, the USSERA establishes certain time frames, dependent on the length of service, within which the returning employee must report back to work. Where military service was less than thirty-one days, the employee must report to work at the beginning of the next regularly scheduled work period on the first full day after release. Where service was between thirty and 181 days, the employee must submit an application for reemployment within fourteen days of release, and where service was more than 181 days, the employee's application has to be submitted within ninety days of release.[103]

Reemployment rights are not absolute. Employees who are dishonorably discharged are automatically disqualified.[104] Reemployment may not be required where the returning employee was only employed as a seasonal or temporary employee, with no expectation of continued employment.[105] Where reemployment is impossible or creates an undue hardship on the employer, it may not be required.[106] Generally, the returning employee must make his desire for reemployment clear[107] and, where the employee has accepted other employment upon his return, reemployment has not been required.[108] Where two or more persons are entitled to reemployment to the same position, the person who left the position has first priority to it, but the other person is entitled, with full seniority, to a position of similar pay and status.

USSERA is to be construed liberally and the protections it offers cannot be lessened or foreclosed by state law or an employment agreement.[109] Those employee protections include the potential of representation, at a jury trial, free of litigation costs, by the United States Attorney General.[110] Accordingly, at least one federal court, distinguishing the preemption clauses found in the FMLA, FLSA and the ADEA, found that agreements to arbitrate do not foreclose an employee's right to litigate under USSERA.[111]

USSERA cases can be brought in federal or state court, depending on who is suing and who is being sued.[112] USSERA actions against private employers are properly brought in federal district court. Where the United States brings a charge against the state (as an employer), jurisdiction is in any federal district court in a location where the state "exercises any authority or carries out any function."[113] Where an employee, without the benefit of representation by the United States government, brings a charge against the state (as an employer), state court is the proper venue. However, an employee may bring a charge against a municipality in federal court.[114] Where an employee engages private counsel to represent him in a claim under USSERA, and he prevails, the court can assess all costs of the proceeding, including attorney's fees and witness costs.[115]

## V. Conclusion

These new and revised leave statutes provide a major indication from both the federal and state governments that employment accommodations, in the nature of leave time away from work without loss of benefits, must be made for certain defined public purposes. The wise public employer will understand the nature of the policies behind each of these leave laws. Moreover, that employer will properly implement them by instituting appropriate policy in its public work place – and distributing such policy to all employees. Public employee unions as well would be wise to understand the nature of these leaves, and the policies that underlie them, so that they can provide adequate advice to their membership and understand the nature of these requirements as they bargain collectively with the employer. Where questions of conflict and priority among these laws arise (as they inevitably will, given the relative newness of some of this legislation) both public employers and employees would be wise to seek the advice of counsel. ♦

### Notes

1. 42 U.S.C. §§ 12101–12182 (2000).
2. Each of the 50 United States has its own Worker's Compensation statute. The Illinois Worker's Compensation statute can be found at 820 ILCS 305/1–305/8 (2005).
3. 29 U.S.C. §§ 2601–2654 (2000).
4. 820 ILCS 180/1–180/999 (2004).
5. 38 U.S.C. §§ 4301–4334 (2000).
6. 29 U.S.C. §§ 2601–2654 (2000).
7. *Price v. City of Fort Wayne*, 117 F.3d 1022, 1024 (7th Cir. 1997).
8. 29 U.S.C. § 2611(4)(A)(iii) (2000).
9. *Id.* § 2611(2).
10. *Id.*§ 2611(2)(B)(ii).
11. *See Fain v. Wayne County Auditor's Office*, 388 F.3d 257, 259-260 (7th Cir. 2004)(finding that Wayne County Auditor's Office should be considered jointly with Wayne County for purposes of determining employee FMLA coverage, thereby designating plaintiff as an "eligible employee" under the FMLA).
12. *See* H.R. Rep. No. 8, pt. 1, at 29 (1993).
13. *See* 29 U.S.C. § 2612(a)(1)(c) (2000).
14. *Id.* § 2611(11).
15. 29 C.F.R. § 825.114(a)(2) (2005).
16. 29 U.S.C. § 2612(e)(1) (2000).
17. 29 C.F.R. § 825.114(a)(2)(iii)(C) (2005).
18. U.S. Dept. of Labor, Form WH380, *available at* <http://www.dol.gov/esa/regs/compliance/whd/fmla/wh380.pdf.> (last visited Feb. 3, 2005).
19. *Magiera v. Ford Motor Co.*, 1998 WL 704061 at *10-*13 (N.D. Ill. 1998).
20. 328 F.3d 379 (7th Cir. 2003).
21. *Id.*at 380.
22. *Id.*
23. *Id.* at 381.
24. *Id.* at 382.
25. *Id.*
26. 29 U.S.C. § 2612(d)(2) (2000).
27. 29 C.F.R. § 825.208(a) (2005).
28. *Id.* § 825.303(b).
29. 29 U.S.C. § 2613(c) (2000).

30. *Id.* § 2613(d).
31. *See, e.g.,* 29 C.F.R. § 825.307(a) (2005).
32. *See Levine v. Children's Museum of Indianapolis, Inc.*, 2002 WL 1800254, at *7 (S.D. Ind. 2002), *aff'd*, 61 Fed. Appx. 298 (7th Circuit 2003).
33. *Id.* at *10, *citing*, S. Rep. No. 103-3, at 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30.
34. 29 C.F.R. §825.303(a).
35. 657 N.W.2d 122 (Mich. Ct. App. 2002).
36. *Id.* at 125-26.
37. *Id.* at 140.The Supreme Court of Michigan denied further review of the case. 666 N.W.2d 667 (Mich. 2003).
38. 29 C.F.R. §§ 825.300(a), 825.301(a)(1), (a)(2) (2005).
39. *Id.* § 825.301(b)(1).
40. *Id.*
41. *Id.* § 825.200(b)-(d).
42. *Id.* § 825.200(e).
43. *Id.* §§ 825.302(d), (g).
44. 820 ILCS 180/1–180/999 (2004).
45. *Id.* 180/1.
46. *Id.* 180/15.
47. *Id.* 180/10-16.
48. *Id.* 180/10-16, 17, 18.
49. *Id.* 180/10-9.
50. 56 Ill. Admin. Code. 280.130 (2005).
51. 820 ILC S 180/20(a) (2004).
52. *Id.* 180/10-12.
53. S. 3126, 93rd General Assembly (Ill. 2004).
54. *Id.*, *see* <http://www.ilga.gov/legislation/billstatus.asp?DocNum=3126&GAID=3&GA=93&DocTypeID=SB&LegID=10629&SessionID=3> (last visited Feb. 4, 2005).
55. 820 ILCS 180/20(a)(2).
56. *Id.* 180/25.
57. *Id.* 180/45.
58. *Id.* 180/40.
59. *Id.* 180/20(c).
60. *Id.* 180/20(c).
61. *Id.* 180/20(d).
62. *Id.* 180/20(a)(1).
63. *Id.* 180/20(c).
64. *Id.* 180/(b).
65. *Id.* 180/20(f).
66. *Id.* 180/30.
67. 5 ILCS 315 (2004).
68. 115 ILCS 5 (2004).
69. 775 ILCS 5 (2004).
70. 820 ILCS 180/30(a) (2004).
71. *Id.*
72. 42 USC § 12101 (2000).
73. 820 ILCS 180/30(b)(3) (2004).
74. *Id.* 180/30(b)(4).
75. *Id.* 180/35(a).
76. 56 Ill. Admin. Code. 280 (2005).
77. *See* http://www.state.il.us/agency/idol/vessa/vessa.htm.
78. 820 ILCS 180/35(a)(1) (2004).
79. *Id.*
80. 56 Ill. Admin. Code.280.410 (2005).
81. 820 ILCS 180/35(a)(1) (2004).
82. 38 U.S.C. § § 4301-33 (2000).
83. 38 U.S.C. §§ 2021-27 (2000).
84. 38 U.S.C. § 4321 (2000).
85. *Id.* § 4303.
86.Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188; 116 Stat. 631 (2002).
87. 38 U.S.C. § 4312 (2000).
88. *Id.* § 4312.
89. 330 ILCS 60/1 to 60/7 (2004).
90. 5 ILCS 330/1 to 330/6 (2004).
91. 50 ILCS 140/1 to 140/5 (2004).
92. 20 ILCS 1805/30.1 to 1805.30.30 (2004).
93. 105 ILCS 5/10-20.7b (2004).
94. 29 U.S.C. § 2611 (2000).
95. See the Scalia/Juarbe/McCutchen Memoradum to Regional Solicitors (July 22, 2002), available at <http://www.dol.gov/vets/media/fmlarights.pdf > (last visited Feb. 14, 2005).
96. 38 U.S.C. § 4303(12) (2000).
97. See *Rogers v. City of San Antonio*, 392 F. 3d 758 (5th Cir. 2004).
98. *Id.* at 768.
99. *Id.*
100. *Id.*
101. *Id.*
102. *See Couture v. Evergreen Int'l Airlines*, 950 F. Supp. 614 (D. Del. 1996) (holding that a DC-8 returning cockpit pilot was not entitled to a job in the cockpit of a 747).
103. 38 U.S.C. § 4312 (2000).
104. *Id.* § 4304.
105. *Id.* § 4301.
106. *Lapine v. Town of Wellesley*, 304 F. 3d 90, 104-05 (1st Cir. 2002).
107. *Carmalt v. Gen. Motors Acceptance Corp.* 302 F. 2d 589, 590 (3rd Cir. 1962).
108. *Hayes v. Tenn. Dept of Conservation*, 750 F. Supp. 298, 305 (E.D.Tenn. 1990).
109. 38 U.S.C. § 4302 (2000).
110. *Id.* § 4323.
111. *Garrett v. Circuit City Stores, Inc.* 338 F. Supp. 2d 717 (N.D. Tex. 2004).
112. 38 U.S.C. §4323 (2000).
113. *Id.* §4323(c).
114. *Harris v. City of Montgomery*, 322 F. Supp. 1319 (M.D. Ala. 2004) (For purposes of USSERA, an action against municipality is properly brought in federal court and the suit is considered a "suit against private employer.").
115. 38 U.S.C. § 4323 (2000).

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## Recent Developments

Recent Developments is a regular feature of The Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the two collective bargaining statutes.

## IELRA Developments

### Coercion and Discrimination

In *Service Employees International Union, Local 73 v. Bloom Township High Sch. Dist. 206*, No.'s 2001-CA-0043C; 2003-CA-0016-C; 2002-CA-0043-C (IELRB 2004), the IELRB held that the discipline, and eventual discharge of an activist union employee and the installation of surveillance cameras violated sections 14(a)(1), (3) and (4) of the IELRA. A vocal and active union member, who was later elected union president, Vince Bove, was warned, suspended, and discharged. Bove had previously been discharged and the IELRB had found that his discharge violated the IELRA and ordered him reinstated and made whole.

The IELRB found that the reasons offered for Bove's discipline and discharge included smoking on work time, reading a newspaper on the clock ands socializing while working, all matters for which similarly situated employees were not disciplined. Each issue cited did not occur in excess and the cited occurrences were to no greater extent than actions of other employees who were not punished. Bove was also reprimanded for behavior that fell clearly into his role as union president. The employer, in

a disciplinary letter, made no attempt to cover the fact that Bove was being disciplined for things he said and did in his capacity as a union advocate. These included statements made at union/management meetings, such as notification to management and that the union was ready to play "hardball" and that the union was willing to force arbitration on particular issues.

The IELRB found that discipline for the union activity was disallowed under sections 14(a)(3) and 14(a)(1) and that Bove's discipline for "not working" was pretextual and a violation of the same sections. Numerous employees engaged in behavior such as reading the newspaper and smoking on the clock and were never warned or reprimanded in any way. The time in which management claimed Bove was "not working" was found to be exaggerated and the times cited included lunch and other breaks explicitly allowed under the collective bargaining agreement. It was clear to the IELRB that Bove was singled out to be punished for behavior that was historically ignored. The selective enforcement by the employer was a violation of the IELRA.

The IELRB also found that the installation of security cameras in the maintenance garage was pretextual and violated sections 14(a)(4), 14(a)(3) and derivatively 14(a)(1). The installation of the cameras followed heated disagreements between Bove and management on such issues as the allocation of overtime, followed the filing of unfair labor practice charges by the union on Bove's behalf, and came shortly after Bove had inquired when he would be paid in accordance with the IELRB's finding that his prior termination had been an unfair labor practice. The IELRB found further that a camera was installed in Bove's work area but not in the work areas of other employees in the bargaining unit. The IELRB concluded that the employer did not have legitimate reasons for installing the cameras and that the installation was part of an effort by the employer to create excuses to discipline Bove.

The IELRB also found that Bove's discharge violated the IELRA. The employer justified the discharge on the ground that Bove violated the no smoking policy but other employees smoked and were not disciplined. The IELRB further found that a memo by Bove's supervisor summarizing the contents of the surveillance tapes exaggerated the extent of Bove's smoking and alleged failure to work while on the clock. Furthermore, the IELRB observed, Bove was treated differently than other employees who appeared on the videotapes.

The IELRB found that Bove did expose the back side of his underpants to the surveillance camera and did raise his middle finger in an obscene gesture to the camera. The IELRB regarded these actions as providing a legitimate reason for Bove's discharge. Thus, the IELRB analyzed the discharge as a dual motive case. It concluded that the employer failed to prove that it would have discharged Bove had he not engaged in protected activity, noting that the exaggerations contained in the summary of the surveillance tapes established that the employer's underlying motivation was improper.

### Duty to Bargain

In *McLean County Unit Sch. Dist. No. 5, and Unit 5 Educ. Ass'n*, No. 2005-CB-0002-S (IELRB 2004), the IELRB denied a request for preliminary injunctive relief where a union, after informing the employer that it had ratified the collectively bargained agreement, refused to sign the agreement on the basis that there were improprieties in the union's ratification process.

Pursuant to a reopener in the collective collectively bargaining agreement, the parties discussed salary, insurance, Unit 5 president's release time, elementary curriculum chairs and secondary building chairs. On June 25, 2004, the parties reached a tentative agreement which all members of Unit 5's negotiating team supported and pledged to recommend ratification. During a membership meeting on July 8, 2004, Unit 5 members voted 167-164 to ratify the agreement. The District was assured that a recount would not be necessary because Unit 5 members who opposed ratification oversaw the vote count. Based on the ratification vote and representations from Unit 5, the District implemented the changes to the CBA. Based on the changes, the District contracted for a new insurance agreement, hired a new employee to cover the replacement time for the president of Unit 5, and authorized hiring for a number of positions.

On July 27, 2004 Unit 5, notified the district that it had received numerous member complaints about the ratification voters and that it would be considering the validity of the vote. On July 28, 2004, Unit 5's executive committee voted to invalidate the ratification vote based on concerns about the security of the ballots, the timing of the ratification vote, misinformation provided at ratification meetings, errors on ballots, and the number of eligible voters, and to conduct a second ratification vote. Nonetheless, on August 4, 2004, the district sent a memorandum to Unit 5 explaining that an agreement had been reached and requested the signing of the Addendum to the Negotiated Agreement and letter of understanding.

On August 11, 2004, the members of Unit 5 voted 280-122, against ratification of the agreement. The district still demanded signing of the agreement, but Unit 5 refused and instructed its members to not sign

payroll deduction forms or write personal checks for contributions to health insurance premiums.

The IELRB identified several factors to consider in deciding whether prelimnary injunctive relief was appropriate: the frustration of the basic remedial purposes of the IELRA, the effect on the public interest, need for immediate restoration of the status quo, the adequacy of normal remedies, and whether irreparable harm will occur. The IELRB refused to award preliminary injunctive relief because: (1) there was no evidence that the district would suffer irreparable harm, (2) any financial loss could be recovered though the Board's normal remedies, (3) the Board's normal remedies were adequate for the case, (4) the alleged violation was not serious or extraordinary, and (5) there was no evidence that there would be a pronounced effect on the bargaining relationship.

## IPLRA Developments

### Card Check Recognition

In *Champaign-Urbana Public Health District v. ILRB, State Panel,* 176 LRRM 2624 (Ill. App. 4th Dist. 2004), the Illinois Appellate Court for the Fourth District invalidated the ILRB's emergency regulations governing card check recognition. The court found that the emergency rules were implemented for an administrative need rather than to prevent an emergent threat to the public interest, safety, or welfare. The court reasoned that unions could have sought and obtained representation through secret ballot elections or by presenting authorization cards signed by a majority of employees to the employer for voluntary recognition. Alternatively, unions could have utilized the new legislation after final rules were promulgated. Therefore, the emergency rules adopted by the Board on September 22, 2003, were invalid.

In *SEIU Local 73 v. Sarah D. Culbertson Memorial Hospital,* No. S-CA-04-044 (ILRB State Panel 2005), the ILRB State Panel upheld the Acting Executive Director's decision dismissing charges that the hospital violated sections 10(a)(2) and (4) of the IPLRA by unilaterally changing its employees' health and dental benefits in retaliation for the union's filing of three majority interest petitions with the Board.

With respect to the retaliation claim, the State Panel found that the union showed that the employees were engaged in protected activity (signing authorization cards and filing for recognition); that the hospital knew of the activity, and that the hospital inflicted an adverse employment action on its employees. However, the State Panel found that the union offered no evidence showing a causal connection between the protected activity and the adverse employment action. The union relied on the close proximity in time (nine days) between the filing of the majority interest petitions and the change in employees' health and dental benefits, but the Board held that this could sustain an action without additional evidence, because the evidence showed that the hospital had increased health insurance premiums for all of its employees, union and non-union alike.

The ILRB also held that the hospital's failure to bargain with the union on the change in insurance benefits did not violate section 10(a)(4) because the change occurred before the union had not obtained formal ILRB certifications as exclusive bargaining representative. The union argued that the newly enacted section 9(a)(5) providing for card check recognition imposed on an employer the duty to bargain at the time of the filing of the majority interest petition. Section 9(a)(5) "allows the Board to designate a labor organization as an exclusive representative without an election if the union demonstrates a showing of majority interest."

The State Panel focused on the differences in language between the National Labor Relations Act and the IPLRA in holding that the new language does not require an employer to bargain with the employee's representative prior to formal Board certification. Section 3(f) of the IPLRA states that an exclusive representative must be designated by the ILRB. This differs from the NLRA's provision in section 9(a) that requires an employer to bargain with a representative "designated or selected by the employees." Thus, the State Panel held, for a duty to bargain to attach, the union must be certified by the ILRB.

### Coverage of Employers

The legislature has amended section 20(b) of the IPLRA, 5 ILCS 315/20(b), with respect to the minimum number of employees that a unit of local government must employ to be covered by the act. Public Act 093-1080 reduces that number from thirty-five to five. The amendment takes effect on June 1, 2005.

### Subjects of Bargaining

In *Chicago Park District v. ILRB, Local Panel,* 820 N.E.2d 61 (Ill. App. 1st Dist. 2004), the First District Appellate Court affirmed the ILRB Local Panel's decision that the Park District violated sections 10(a)(1) and 10(a)(4) of the IPLRA by reducing the hours of its part time employees without bargaining with their exclusive representative, Service Employees International Union, Local 73.

The Court affirmed the Local Panel's decision that the reduction in hours was a mandatory subject of bargaining. The court applied the test established in *Central City Education Ass'n v. IELRB,* 149 Ill.2d 496; 599

N.E.2d 892 (1992).

The district argued that the decision to reduce employee hours was not a mandatory subject of bargaining because part-time employees traditionally worked varying hours and schedules and were never guaranteed that their schedules would remain static. However, the court found that the employees had regularly worked the same number of hours in the past, the only change occurring in the summer months when they worked more, and that the reduction in hours did not result in a reduction in the amount of work the employees were expected to perform. Additionally, the reduction in hours resulted in the part-time employees losing their benefits; therefore the court found that the reduction in hours was a matter of wages, hours, and terms and conditions of employment.

The court also held that the decision was a matter of inherent managerial authority. The court found that the reduction in hours was driven by financial constraints, specifically the district's concern about its overall budget and the standards of services it would provide because of those financial concerns, and therefore involved the exercise of inherent management authority.

The court balanced the benefits of bargaining to the decision making process against the burdens that bargaining would impose upon the district's authority. The district argued that, because of the complexity of adjusting the work schedules of hundreds of locations to meet overall budgetary constraints while minimizing adverse impact on the district's priorities, the burdens of bargaining outweighed the benefits. However, the court found that the district had not established a need for speed in making this decision. The court also found that the union could have offered alternative solutions to the district's financial problems, especially since the union and the district were in the middle of contract negotiations.

## Supervisors

*In Metropolitan Alliance of Police, Bellwood Command Chapter No. 339 v. ILRB,* 820 N.E.2d 1107 (Ill. App. 1st Dist. 2004), the First District Appellate Court affirmed the State Panel's decision dismissing Metropolitan Alliance of Police's representation petition for a bargaining unit for sergeants and lieutenants who were employed by the Village of Bellwood Police Department. The Union argued on appeal that the ILRB's determination that sergeants and lieutenants were supervisors pursuant to section 3(r) of the IPLRA was erroneous. The Union contended that the sergeants and lieutenants did not exercises supervisory authority with consistent use of independent judgment. The supervisory authority at issue was disciplining subordinate employees. In particular, sergeants and lieutenants issued personal incident reports to patrol officers for minor rules infractions. Personal incident reports were the first step in formal progressive discipline. The union maintained, however, that the issuance of personal incident reports did not require the consistent use of independent judgment.

The court held that sergeants and lieutenants consistently used independent judgment with regard to disciplining patrol officers and civilian personnel; therefore the sergeants and lieutenants were supervisors for purposes of the IPLRA and excluded from participation in the same collective bargaining unit as nonsupervisors.

The court found the decision in *City of Freeport v. ISLRB,* 135 Ill.2d 499, 554 N.E.2d 155 (1990) instructive. In *Freeport,* the court found that the sergeants and lieutenants were supervisors within the meaning of section 3(r) of the IPLRA because of their authority to use independent judgment in imposing discipline.

In the instant case, the court held that the board correctly determined that sergeants and lieutenants were supervisors within the meaning of the IPLRA because they performed at least one indicia of supervisory authority with independent judgment: they had the ability to issue personal incident reports in lieu of oral reprimands. A personal incident report was a step above an unrecorded verbal reprimand in the progressive disciplinary policy instituted by the Department and was evidence in a personnel file that a disciplinary action had been taken against an officer.

The union argued, however, that the sergeants and lieutenants did not use independent judgment and discretion. The union relied on a directive from the deputy police chief which admonished, "Disciplinary action will be taken against any supervisor who does not write up any full-time officer, part-time officer, dispatcher, and records clerk who reports late for duty." The court, however, pointed to testimony from the police chief that sergeants and lieutenants retained discretion to issue or not issue the personal incident reports. Consequently, the court affirmed the decision of the ILRB, State Panel dismissing the representation petition. ◆

## Further References

(compiled by Yoo-Seong Song, Librarian, Institute of Labor and Industrial Relations Library, University of Illinois at Urbana-Champaign)

Ferris, Frank & Albert C.Hyde. FEDERAL LABOR-MANAGEMENT RELATIONS FOR THE NEXT CENTURY – OR THE LAST? *REVIEW OF PUBLIC PERSONNEL ADMINISTRATION*, vol. 24, no. 3, September 2004, pp. 216-233.

The authors of this article argue that the new human resources management system at the Department of Homeland Security (DHS) will signal a new direction for future federal labor-management relations. While this new system at DHS is being discussed and examined by many bargaining units, the authors view the environment surrounding this new system design and implementation as dramatically different from the one under the Clinton Administration. Depending on the outcome, the authors assert that federal labor-management relations can either go forward or backward. After illustrating a brief history of federal labor-management relations under previous administrations, the authors present recommendations for change that will help ensure partnership and collaboration to continue.

Walsh, J. William, Sheila Vicars-Duncan, & Sammie Robinson. FIREFIGHTERS' OFF-DUTY MISCONDUCT AND "JUST-CAUSE" FOR DISCIPLINE: A REVIEW OF ARBITRATION CASES. *JOURNAL OF COLLECTIVE NEGOTIATIONS IN THE PUBLIC SECTOR*, vol. 30, no. 3, 2003, pp. 209-222.

This article examines several cases where firefighters in various states received disciplinary actions against their off-duty misconduct. By reviewing those cases, the authors attempt to draw some uniform principles that affect sustaining or denial of grievances. Particularly interesting is the question as to whether the legality of a specific misconduct warrants and justifies discipline. The authors present cases where arbitrators sustained the imposition of discipline against legal off-duty conduct and also denied the imposition (or reduced the severity) of discipline against illegal off-duty conduct. The authors provide some criteria for establishing "just cause" for discipline, and then briefly compare the criteria to those used in the private sector.

Hays, Steven W. TRENDS AND BEST PRACTICES IN STATE AND LOCAL HUMAN RESOURCE MANAGEMENT. *REVIEW OF PUBLIC PERSONNEL MANAGEMENT*, vol. 24, no. 3, 2004, pp. 256-275.

This article reports research findings funded by the Annie E. Casey Foundation to collect HRM best practices in state and local governments. The author summarizes trends and best practices in such areas as recruitment, training, compensation, and role of HR departments at state and local governments. The research team identified 133 state and local jurisdictions which have reported innovative HRM practices in the literature and then closely studied 20 jurisdictions for further analysis. The article provides overviews of traditional problems that those government agencies had faced and their innovative HRM solutions to make improvements. At the end of the article, the author also discusses the role of labor unions in the success of innovative HRM practices in local and state governments by presenting a case of the state of Wisconsin.

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(Books and articles anotated in Further References are available on interlibary loan through ILLINET by contacting your local public library or system headquarters.)

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